IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 512.

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of Yokohama Specie Bank, Ltd.,

Petitioner,

—against—

EUGENE T. SINGER.

No. 527.

EUGENE T. SINGER,

Petitioner,

—against—

THE YOKOHAMA SPECIE BANK, LIMITED,

and

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF FOR THE SUPERINTENDENT OF BANKS.

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REPLY BRIEF FOR THE SUPERINTENDENT OF BANKS.

Preliminary.

Plaintiff, Eugene T. Singer, has filed a 78 page answering brief containing many statements to which the Superintendent takes exception and arguments with which he disagrees. To answer each of these state-

ments and arguments in detail would require a brief almost as long as that filed by plaintiff. However, the reasoning which underlies practically all of plaintiff's arguments involves a few basic assumptions which, if untrue, render untenable substantially all of the arguments contained in the brief. It is to these basic assumptions that attention will be directed.

POINT I.

Plaintiff's claim is based upon a prohibited transaction.

A basic error underlying plaintiff's argument is the assumption that his claim is predicated, not upon an attempted remission of funds from Japan to New York, but solely upon an advice by the New York Agency to Standard in New York that the Agency had received instructions from abroad to make payment to Standard and was ready to do so upon issuance of a license. Treating this advice in isolation and not as a component part of the entire transaction, plaintiff concludes that the transaction upon which his claim is based is not prohibited by Executive Order 8389 and, therefore, requires no license for its validation.

The simple answer to this argument is that plaintiff's claim is based not merely on the advice given by the Agency to Standard, but upon the entire course of dealing between the parties commencing with the payment by Standard of yen to the Yokohama office of the bank, the credit by that office of the dollar equivalent thereof to the account of the New York Agency appearing on its books; the cable instructions from that office to the Agency to make payment to Standard and, only lastly, the advice to Standard of

the receipt thereof and of the readiness of the Agency to pay upon obtaining a license.

This entire course of dealing must be viewed in its entirety and when so viewed, constitutes a remission of funds by cable transfer of credit from Japan to New York. There is not the slightest room for doubt that when Congress enacted the Joint Resolution of May 10, 1940, approving Executive Order No. 8389, as it then stood,* it intended to place under Treasury

* Plaintiff has suggested (Br., pp. 24-31) that the scope of the freezing control program was substantially narrower at the time the transaction took place than it is today. The fact is, however, that Section 1 of the Executive Order, which contains the provisions involved in this action, has remained substantially unchanged since the Order was first issued on April 10, 1940. Since the Order was expressly ratified and confirmed by the Joint Resolution of May 10, 1940, it must be accepted that the provisions of the Order are authorized by Section 5(b) of the Trading with the Enemy Act.

Plaintiff also suggests that the prohibitions of the Order were limited to transactions performed wholly within the United States. It is clear, however, that the Order prohibited more than this. Paragraph A prohibited not only transfers of credit between banking institutions within the United States, but also transfers of credit between banking institutions within the United States and banking institutions outside the United States. In addition, paragraph C prohibited all transactions in foreign exchange by persons within the United States. As we construe this subdivision, transactions in foreign exchange occurring outside the United States are prohibited if entered into by persons within the United States. The same is true with respect to paragraph E prohibiting dealings in evidences of indebtedness "by any person within the United States". Furthermore, General Ruling 12 was declared by the Secretary of the Treasury to be declaratory of pre-existing law and regulations (Supt.'s Main Br., p. 64) and by its own terms (Par. 5.A) defines transfers to include transactions "whether or not done or performed within the United States". At any rate, the First War Powers Act (Id. p. 48), which plaintiff concedes covered transactions outside the United States, expressly empowered the President to nullify transactions theretofore entered into, and General Ruling No. 12, which as stated specifically applies to transactions outside the United States, covers not only transactions entered into subsequent to its issuance, but purports to affect all transactions which occurred subsequent to the issuance of the Order in 1940 (Par. 1).

control a "transfer of credit"* such as this. A contrary holding would emasculate the provisions of the Order, especially those prohibiting transfers of credit between banking institutions within the United States and banking institutions outside the United States (Section 1, A).**

It is crystal clear that plaintiff's claim is based upon this entire course of dealing and that without it he would have had no rights of any kind against the Agency. If there could be any doubt about this, it is laid at rest by the opinions of the Court of Appeals, whose holding in this respect must be considered as conclusive. Thus in its first opinion the Court of Appeals stated (R. 528):

> "When on August 27, 1941, Yokohama Specie at its home office in Japan accepted funds from Standard it thereby became indebted to Standard in the amount then deposited. When on August 29, 1941, following instructions from Standard,

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* For brevity we refer to "transfer of credit" as including a transaction in foreign exchange, a dealing in an evidence of indebtedness, and a payment by and to banking institutions, all as prohibited by Section 1 of the Executive Order.

** This entire subject is discussed in detail in our main brief (pp. 16-20).

Plaintiff's suggestion that a transaction cannot be held to come within the scope of the Executive Order unless the parties have performed acts subjecting themselves to the criminal penalties of the Order is groundless. As the Government's brief on the motion to dismiss in No. 513 points out (p. 7), the Federal officials have—

> "insisted that parties seeking a license execute in advance all instruments necessary, as a matter of private law, to effectuate the transaction."

Thus the fact that neither the Agency nor plaintiff may have subjected themselves to criminal penalties by anything they did is no demonstration that the transaction in question did not fall within the licensing provisions of the Executive Order.

and acting under its New York license, Yokohama Specie transmitted those funds by cable from Japan to its New York Agency, we think the consequent oral and written communications, to which reference has been made—by which the New York Agency advised Standard that it was in funds from its Yokohama home office which it was instructed to pay to Standard—served to create an enforcible legal obligation by the New York Agency to make such payment."

and the Court continued (R. 528):

"Our conclusion is that the course of dealing which culminated in the advice to Standard by Yokohama Specie's New York Agency, given in accord with instructions from its home office in Japan, was a *transaction* * * * within the provisions of section 606, subdivision 4, paragraph (a) of the Banking Law."

Thus, it plainly appears from the first opinion of the Court of Appeals that plaintiff's claim is based upon the entire course of dealing between the parties and specifically upon the transfer of funds from Japan to New York and the advice by the Agency to Standard with respect thereto. If anything more were needed to prove this fact, it is supplied by the second opinion of the Court of Appeals. In that opinion the Court repeated again and again its holding that plaintiff's claim is based upon the entire course of dealing between the parties including the transmission of funds from Japan to New York and, therefore, required validation. Quotations to that effect are set forth at pages 19 and 20 of our main brief, and we shall not burden this brief with a repetition thereof.

It follows that plaintiff's assumption that his claim is not based upon a prohibited transaction is plainly untenable. The failure of this assumption undermines plaintiff's entire argument.*

POINT II.

The Court of Appeals gave effect to the prohibited transaction by holding that plaintiff's claim was accrued and established.

We think it has been made plain in our main brief (pp. 20-26) that the Court of Appeals, while recognizing that plaintiff's claim was based upon a prohibited course of dealing, nonetheless gave effect thereto by holding that the claim was accrued and established and held that the Executive Order merely prevented payment until the underlying transaction was licensed. In so holding, the Court apparently relied upon General Ruling 12 (R. 528). That Ruling, after providing in paragraph 1 that prohibited transactions shall be "null and void" insofar as they transfer an interest in blocked property, goes on to state in paragraph 4 that when involved in litigation, a prohibited

* The suggestion by plaintiff (Br., p. 41 *et seq.*) that Section 7(b) of the Trading with the Enemy Act somehow limits the application of the Executive Order has not, so far as we know, been made in any of the courts below. Plaintiff does not make it clear just how this section would affect the problem before the court, but it seems plain that to the extent that the section is inconsistent with the Executive Order, the provisions of the Order as ratified by the Joint Resolution of Congress of May 10, 1940 and by the First War Powers Act of December 18, 1941, must control and that the provisions of Section 7(b) must be deemed amended or repealed accordingly. See *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 and footnote 4, page 9, in the brief filed by the Government in this proceeding as *amicus curiae*.

transaction shall be "valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated" with the proviso, however, that no judgment entered in such an action "shall confer or create a greater right * * * or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act * * *."

Basing its action upon paragraph 4 of this Ruling (R. 528), the Court treated the transaction in suit as valid and enforcible for the purpose of determining the rights of the parties, and in doing so, it totally ignored not only the provisions of Section 1 of the Ruling, but also the proviso contained in paragraph 4. In effect, the Court held that the Executive Order did not prevent giving effect to the prohibited transaction, but merely prevented payment until a license was obtained. In fact, the amended remittitur specifically so states (R. 542).

The Court of Appeals has consistently interpreted the Executive Order and General Ruling No. 12 in this manner. It has repeatedly indicated that it could enter judgments giving effect to prohibited transactions and creating rights in blocked property subject only to the stipulation that payment must be postponed until a license is obtained. See *Polish Relief Comm.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332 (1942); *Feuchtwanger* v. *Central Hanover Bank and Trust Company*, 288 N. Y. 342 (1942); *Leeds* v. *Guaranty Trust Co.*, 65 N. Y. Supp. (2) 431, affirmed without opinion 272 App. Div. 909, and 297 N. Y. 1019 (1948). Although most of these decisions can be explained on other grounds, a review thereof reflects the consistent view of the Court of Appeals that

the Executive Order does not prevent the creation or accrual of rights based upon, or the giving effect to, prohibited transactions but merely prevents payment until a license is obtained.

This view is perhaps best illustrated by the *Leeds* case, *supra* (discussed in our main brief, pp. 23-4), where plaintiff sought to enforce an assignment of blocked property and moved to strike out a defense which alleged that the assignment, being unlicensed, was void and of no effect. In granting the motion, the Court at Special Term stated (65 N. Y. S. 2d 431, at page 432):

> "The plaintiff assails this defense on the ground that a license was not a condition precedent to the transfer but was only required to enable the defendant Guaranty Trust Company to make payment over to plaintiff of the deposit and the delivery of the stock and other securities. In other words, plaintiff urges that the provisions of Executive Order No. 8389 as amended interdicted solely payment and not the prosecution of an action or the assignment of a claim or property. Plaintiff's position is sustained by the authorities. See *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E. 2d 726 * * *."

This decision was affirmed by the Court of Appeals without opinion.

It is this same series of New York cases that was urged upon this Court (and the lower federal courts) in *Propper* v. *Clark* in support of the argument that the Freezing Order does not prohibit a subsequent judicial order transferring title to blocked assets and

that the needs of the freezing control program would be served by a provision against payments from frozen funds without a license. In overruling this argument in the *Propper* case, this Court in effect disapproved of the theory of these New York cases. The Court refused to treat the prior judicial transfer there involved as valid and enforcible, but on the contrary expressly held that this transfer was null and void and did not create in the transferee any right, title or interest whatsoever. For the same reason, it should be held in this case that the extra-judicial transfer of credit upon which plaintiff relies is, in the absence of a license, null and void; and does not give rise to a claim in plaintiff's favor.

Plaintiff argues (Point I-C, pp. 37-41) that the *Propper* case is distinguishable from the instant case because there a transfer of title to the receiver was involved and this Court held that such transfer of title constituted a prohibited transfer of credit within the meaning of the Executive order and was, therefore, void until licensed; whereas here, according to plaintiff, the underlying transaction was not prohibited for here there was no transfer of title and no transfer of credit upon which the Executive Order could operate. This argument, which repeats, in another form, the argument referred to in Point I of this brief, is based upon the erroneous assumption that the only requirement for the establishment of a claim under the New York Banking Law is an acknowledgment by the Agency to Standard of a pre-existing obligation of the foreign corporation; that the transfer of funds from Japan to New York and the other acts related thereto are not essential to his claim and that it is, therefore, immaterial whether

the Executive Order prohibits them; and that all that is required is a license permitting payment.

We believe we have demonstrated the fallacy of this argument. The Court of Appeals has conclusively held that plaintiff's claim is based upon the entire course of dealing, including specifically the transfer of funds from Japan to New York, and it has given effect to this transfer by holding, notwithstanding the prohibitions of the Act, that plaintiff's claim is established and accrued under New York law. It follows that the instant case does involve a prohibited transfer of credit and that the decision of this Court in *Propper* v. *Clark* is directly applicable.

POINT III.

The result of the decision of the Court of Appeals is to create in plaintiff a greater right in blocked assets than its owner could have given by voluntary transfer.

It has been shown in our main brief (pp. 26-31) that the result of the decision of the Court of Appeals will be to shift to plaintiff a portion of the blocked credit which appears on the books of the Agency in favor of the Yokohama office of the bank and, in addition, it will give plaintiff an interest in the blocked property of the Agency itself. We think it is perfectly plain that this is the result of the decision. If the transaction of August 29th had not occurred, plaintiff would have had no claim against the Agency or against the Superintendent as its statutory receiver; whereas under the judgment of the Court of Appeals

plaintiff acquired, as a result of that transaction, a beneficial interest in such assets and a preferred right to participate therein.

Plaintiff argues that the judgment entered in his favor does not create in plaintiff a greater right than could have been created by the Agency or the Superintendent by their voluntary acts. This argument cannot be supported. As was shown in our main brief (pp. 27, *et seq.*) the effect of the judgment of the Court of Appeals is to give plaintiff an interest *in rem* in the funds in the possession of the Superintendent. This right is in addition to plaintiff's right *in personam* against the bank as a whole.

Neither the Agency nor the Superintendent could have voluntarily given plaintiff any such interest in the funds of the Agency. While in the possession of the Agency the funds were blocked and could not be paid out without a license, nor could they be assigned or transferred in any other form. While in the possession of the Superintendent, they could not be paid out except to the extent that they were paid to creditors of the Agency. The Superintendent was not authorized by voluntary act to create an interest in the funds of the Agency through the process of accepting plaintiff's claim. Acceptance of the claim would have been as much a violation of Executive Order 8389 as the judgment rendered by the Court of Appeals. Since the claim was based upon transactions prohibited by the Order, plaintiff can obtain no interest therein either through acceptance by the Superintendent or by judgment of the Court. Therefore, the judgment of the Court created in plaintiff a greater interest in the assets of the Agency than could have been given him by voluntary action of either the Agency or the Superintendent.

POINT IV.

Neither the transaction underlying plaintiff's claim nor payment thereof has been licensed.

Plaintiff concedes in Point II of his brief (p. 45) that none of the documents in the record "license the creation of new claims, or validate invalid transactions". His argument that payment of his claim has been licensed is expressly based upon the assumption "that none of the transactions underlying plaintiff's claim was prohibited" (Point Heading, p. 45). In our view, these statements by plaintiff are determinative of the license question. As has been shown, plaintiff's claim is irrevocably wedded to the transaction of August 29, 1941. The decision of the Court of Appeals so holding is, in our view, conclusive. Since the transaction underlying plaintiff's claim fell within the prohibitions of the Order, it must be validated by the licensing authorities. This is true whether this Court reverses the decision of the Court of Appeals and holds that the Executive Order prevented the accrual or creation of plaintiff's claim; or affirms and holds that the Executive Order permits giving effect to the prohibited transaction but prohibits payment until the underlying transaction is validated. In either event the underlying transaction must be validated, and plaintiff concedes that no such validation has taken place.

It would, therefore, appear that there is no substantial issue between the parties on the licensing question. We, of course, disagree with many of the subsidiary arguments contained in plaintiff's brief

with respect thereto (pp. 45-55), but since our views are fully set forth in Point II of our main brief (pp. 33-46), they will not be repeated here.

POINT V.

For the foregoing reasons the judgment of the Court of Appeals should be reversed on the issue presented in No. 512 and affirmed on the issues presented in No. 527.

Respectfully submitted,

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